IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 353

MILK WAGON DRIVERS UNION OF CHICAGO, LOCAL 753, A VOLUNTARY UNINCORPORATED ASSOCIATION; ROBERT G. FITCHIE, JAMES KENNEDY, STEVE SUMNER, FRED O. DAHMS, F. RAY BRYANT, ALBERT O. RICHARDS, JOSEPH L. PATTERSON AND DAVID RISKIND,

Petitioners,

vs.

MEADOWMOOR DAIRIES, INC.,
A CORPORATION,

Respondent.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING UPON THE ORDER OF OCTOBER 23, 1939 DENYING CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND TO DEFER CONSIDERATION OF THE SECOND PETITION FOR REHEARING TO AND INCLUDING OCTOBER 7, 1940.

JOSEPH A. PADWAY,
Counsel for Petitioners.

DAVID A. RISKIND,
ABRAHAM W. BRUSSELL,
Of Counsel.

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Now come Milk Wagon Drivers Union of Chicago, Local 753, a Voluntary Unincorporated Association; Robert G. Fitchie, James Kennedy, Steve Sumner, Fred O. Dahms, F. Ray Bryant, Albert O. Richards, Joseph L.

Patterson and David Riskind, petitioners, by their coun
sel Joseph A. Padway and Abraham W. Brussell, an
ask leave to file a second Petition for Rehearing, upo
the order denying certiorari to Supreme Court of Illinois o
October 23, 1939, and further move that considerati
of said Second Petition for Rehearing be deferred to an
including October 7, 1940, or for such order as this Hon
orable Court may deem meet under the circumstances.

Respectfully submitted,

JOSEPH A. PADWAY,
Counsel for Petitioners.

DAVID A. RISKIND,
ABRAHAM W. BRUSSELL,
Of Counsel.

SUGGESTIONS IN SUPPORT OF MOTION.

On October 23, 1939 this court denied Petitioners' Petition for Writ of Certiorari to the Supreme Court of Illinois (84 L. Ed. 95).

Petitioners filed a first Petition for Rehearing, and Rehearing was denied on December 4, 1939 (84 L. Ed. 221).

Petitioners believe that a second Petition for Rehearing should be presented to this court because of events *subsequent* to the previous rulings of this court. Petitioners suggest that decisions of this Court, the Supreme Court of Illinois, and of the courts of other States that have been handed down since the prior rulings in the instant case warrant the presentation of a motion to this court asking *leave* to file a second Petition for Rehearing.

Petitioners suggest that in at least two causes this Court has granted certiorari, wherein the problem of free speech under the due process clause of the Fourteenth Amendment to the Federal Constitution raised in their Petition for Certiorari in the instant cause is placed squarely before this court for determination. These are as follows:

(1) One case involves the same petitioners as in the case at bar with the exception of petitioner, David Riskind; that case is *Milk Wagon Drivers Union, Local 753, etc.* v. *Lake Valley Farm Products, Inc., et al.*, Docket No. 770, Oct. Term., 1939, Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted on April 1, 1940 (84 L. Ed. 650).

(2) The second is entitled *American Federation of Labor, et al.* v. *Swing, et al.*, Docket No. 929, Oct. Term,

1939, Petition for Certiorari to the Supreme Court of Illinois granted *May 20, 1940.*

It is respectfully suggested that the injunction restraining all peaceful picketing granted by the Supreme Court of Illinois in the case at bar, is subject to the same constitutional defects as the injunction decrees under attack and now under consideration by this court in the two aforesaid cases that will be argued and heard at the October Term, 1940.

In addition, petitioners respectfully suggest that a decision of the Supreme Court of Illinois of April 10, 1940, entitled, *Ellingsen, et al.* v. *Milk Wagon Drivers Union*, No. 25381 (opinion unpublished since cause is now pending upon Petition for Rehearing) conclusively shows that the decision of the Supreme Court of Illinois in the instant cause granting a decree to restrain *all* peaceful picketing is *not* based upon *violence.* In this *Ellingsen* case the court said, speaking with reference to the *Meadowmoor* case (the instant case), said:

> "In that case there was some evidence of violence, but an examination of the opinion will disclose that the issue of violence was not the turning point of the decision."
>
> (Commerce Clearing House Labor Law Service, *Ellingsen, et al.* v. *Milk Wagon Drivers Union of Chicago,* at page 19626.)

Petitioners further respectfully suggest that the decisions of this court in *Thornhill* v. *Alabama,* No. 514, October Term, 1939, Docket No. 514, 84 Law. Ed. 659, and *Carlson* v. *California,* Docket No. 667, Opinions filed April 22, 1940 (84 Law. Ed. 668) and the reasoning in the opinions tend to indicate that the decision of the Illinois Su-

preme Court, sought to be reviewed in the instant case, is erroneous.

Petitioners further suggest that the reasoning in *Cantwell* v. *Connecticut*, Docket No. 632, Oct. Term, 1939, opinion filed May 20, 1940, recognizes that "conflict" in beliefs does not warrant restraint of free speech.

Petitioners suggest that there is strong social reason for reconsideration by this court of the injunction decree directed by the Illinois Supreme Court. The other cases pending before this court present the question of law whether an equity court may restrain peaceful picketing. We suggest that the case at bar presents the *additional* question whether an equity court is warranted in restraining peaceful picketing in the *future* on the narrow ground that in the *past* the picketing has included *both* peaceful activity and *violence*.

The decree of the Illinois Supreme Court in the instant cause prevents the Union from competing with the Meadowmoor dairies by peaceful picketing of milk stores. This makes rigid the economic status existing in the social picture. The injunction prohibits the Union from appealing to the public by the exercise of the rights of the individual union members to free speech under the due process clause of the fourteenth amendment to the Federal Constitution.

Petitioners recognize that a motion asking leave to file a *second* Petition for Rehearing upon denial of certiorari is an unusual motion. Their justification is that the decision of the Illinois Supreme Court measured in the light of subsequent decisions of this court presents an unusual situation where this court alone can give full and just relief. We also recognize broad social policy of this Honorable Court, upon petition, to re-examine the records

and to vacate its own decisions and orders denying certiorari where the ends of justice seem to require or where conflicts *subsequently* developed.

In *United States* v. *Boston Insurance Company*, 269 U. S. 197, 46 S. Ct. 97, this Court re-examined the record and reversed a previous ruling and in the course of the opinion said:

> "Upon a re-examination of the record, it becomes plain that we misapprehended the opinion and ruling of the lower court; also that the reason advanced to support our conclusion is insufficient. The Commissioner of Internal Revenue had refused to allow the deduction claimed because of addition to the reserve for unpaid loss claims . . . The Court of Claims in a perplexing opinion approved the Commissioner's action . . ."
>
> 269 U. S. at 203.

In the recent case of *Fairbanks* v. *United States*, 306 U. S. 436, this court vacated its order denying the petition for certiorari to the Circuit Court of Appeals for the Ninth Circuit because of a *subsequent* conflicting decision of the Circuit Court of Appeals for the First Circuit. In that case this Court said:

> "This conflict caused us to bring up the present cause notwithstanding the application for certiorari had been denied earlier in the term."
>
> 306 U. S. at 438.

In *Robert G. Stone, et al., Trustees* v. *Thomas W. White, Former Collector*, 300 U. S. 643, this Court, after granting several extensions of time, entered the following order:

> "March 15, 1937. The motion for leave to file and the petition for rehearing are granted. The orders heretofore entered on October 14, 1935 and December

, 1936 denying the petition for certiorari and petition for rehearing herein are vacated and the petition for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted."

In *Roberts, as Receiver* v. *Murray, as Receiver,* Docket No. 558, Oct. Term, 1939, this court *twice* granted motion to defer consideration of petitions for certiorari (84 Law. Ed. 339, and subsequent thereto).

These precedents, and others that might be cited, support our motion asking leave to file a second Petition for Rehearing upon the denial of certiorari on October 23, 1939.

If this Honorable Court sees fit to give petitioners leave to file a second Petition for Rehearing it is further suggested that due to the approaching end of the October, 1939, Term that the court name a date when such petition shall be filed and defer consideration on such petition until October 7, 1940.

JOSEPH A. PADWAY,
Counsel for Petitioners.

DAVID A. RISKIND,
ABRAHAM W. BRUSSELL,
Of Counsel.

AFFIDAVIT OF COUNSEL.

I, ABRAHAM W. BRUSSELL, attorney at law of Chicago, Illinois, being duly sworn, depose and say that I am a member of the bar of the Supreme Court of the United States, and I am associated in this cause with Joseph A. Padway, attorney of record for petitioners in this cause; that I am authorized to prepare and have caused to be prepared the foregoing motion; that I am authorized to sign the motion and affidavit on behalf of Joseph A. Padway; that in my opinion there exist real and sufficient grounds for the granting of certiorari in this cause. I further state that this motion is filed in good faith and is not filed for the purpose of delay.

ABRAHAM W. BRUSSELL.

Subscribed and sworn to before me this 23rd day of May, 1940, at Chicago, Illinois.

ANN F. HRIZAK,
Notary Public.

My commission expires February 26, 1942.

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